A

SULAIMAN & TAYE v. BORNEO SYNERGY (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
NORDIN HASSAN J
[CIVIL SUIT NO: S-22NCVC-536-11-2015]
17 NOVEMBER 2017

B

CONTRACT: *Oral agreement – Proof of – Agreed lump sum legal fees – Whether agreement as to costs must be in writing and signed by parties – Agreement 'may' be made in writing under s. 116 of Legal Profession Act 1976 – Whether permissive and not mandatory – Whether oral agreement established – Whether work done proportionate with agreed legal fees – Whether oral agreement enforceable – Contracts Act 1950, ss. 9 & 10*

C

LEGAL PROFESSION: *Costs – Suing for costs – Agreed lump sum legal fees – Whether agreement as to costs must be in writing and signed by parties – Agreement 'may' be made in writing under s. 116 of Legal Profession Act 1976 – Whether permissive and not mandatory – Whether oral agreement established – Whether work done proportionate with agreed legal fees – Whether oral agreement enforceable – Contracts Act 1950, ss. 9 & 10*

D

The plaintiff, a law firm, brought this action against the defendant for unpaid legal fees and disbursements. DW1, a director of the defendant was introduced to Mr Sng Eu Kim ('PW1'), a partner in Messrs Sng & Co, by PW2 sometime in 2010. PW1 was retained by the defendant to take over the conduct of a pending suit ('Suit 689') from another legal firm. A lump sum legal fees in the amount of RM260,000, excluding service tax of 6%, was agreed upon by DW1 and PW1. Subsequently, PW1 left Messrs Sng & Co to join the plaintiff as a partner on or about May 2011, and brought together with him the defendant's file. He continued handling the case which was not objected to by DW1. In 2013, after a full trial, Suit 689 was decided in favour of the defendant. Hence, the plaintiff issued invoices to the defendant for payment, among others, invoice no. 0063 for the amount of RM275,000 being the agreed fees of RM260,000 and 6% service tax. However, the defendant failed to pay the amount and hence, the action by the plaintiff against the defendant which was premised upon the oral agreement between the plaintiff and DW1 for a lump sum legal fees of RM260,000 excluding service tax of 6%. On the other hand, the defendant contended that an agreement as to costs must be in writing and signed by parties as required under s. 116 of the Legal Profession Act 1976 ('LPA'). Hence, the defendant pleaded that the alleged oral agreement had violated ss. 118 and 121(1)(a) of the LPA and was thus, void and invalid. The defendant also contended that there was no privity of contract between the plaintiff and the defendant and that the agreement as to the fees, if any, was between Sng & Co and the defendant and not between Sulaiman & Taye and the defendant. The defendant also counterclaimed against the plaintiff for negligence in the conduct of Suit 689 in failing to adduce the available evidence.

E

F

G

H

I

Held (allowing plaintiff's claim; dismissing defendant's counterclaim):

(1) There was no written agreement between the parties in regard to the amount of legal costs pursuant to s. 116 of the LPA. The wordings of sub-s. 116(1) of the LPA are clear and unambiguous that an advocate and solicitor 'may' make an agreement in writing with the client with regard to the legal fees. The word 'may' in s. 116(1) should be given its ordinary and natural meaning which is, it is permissive and not mandatory unless it can be shown otherwise. There was nothing to indicate or was there basis to conclude that the word 'may' in s. 116(1) should be read as 'shall' or 'must'. (paras 11, 14, 15 & 17)

(2) The provision of sub-s. 118(1) clearly refers to an agreement pursuant to s. 116 of the LPA which was an agreement in writing and signed by the client which was not the situation in the present case. Hence, s. 118 was not applicable. There was also no infringement of s. 121(1)(a) of the LPA as the plaintiff's case was that the plaintiff's remuneration was a fixed sums agreed by both parties. (paras 21 & 22)

(3) There was a conflict of evidence between PW1 and PW2's version and DW1's version as regard to the oral agreement of the lump sum legal fees of RM260,000. It is trite law that the court can only rely on the contemporaneous document to resolve the conflict of evidence. The evidence of PW1, PW2 and the invoice no. 0063 showed that there was a clear and specific agreed fixed legal fees in the sum of RM260,000. Therefore, the contention that the amount agreed was vague and unclear was untenable. The oral agreement for the fixed legal fees was enforceable pursuant to ss. 9 and 10 of the Contracts Act 1950. (paras 30, 31, 34 & 35)

(4) The work done by the plaintiff from May 2010 to July 2013, which included the preparation, research work and other related matters, including the conduct of the appeal at the Court of Appeal to reinstate the second defendant in Suit 689, and the full trial in that case for the plaintiff, was proportionate with the agreed fixed legal fees. The fees, based on the work done by the plaintiff, was fair and reasonable. (para 36)

(5) The defendant's contention on privity of contract was without merit. It was not the defendant's pleaded case that the plaintiff was not entitled to claim the fees as the plaintiff was not the party to the agreement. Further, DW1 had admitted that the only counsel he liaised with and gave instruction to was PW1 when PW1 was with Sng and Co. DW1 also did not object when PW1 continued to handle DW1's case when PW1 moved to Sulaiman & Taye. In fact, DW1 continued to give instructions after PW1 moved to the plaintiff's firm. (paras 37, 38 & 40)

(6) It is well settled law that an advocate is not immune from a negligence suit. The principle is in line with the basic duty of care owed by an advocate and solicitor to his client, the duty to exercise reasonable skill and diligence in handling their client's case. Having considered the evidence in totality, the defendant had failed to prove negligence on the part of the plaintiff in handling Suit 689. The plaintiff had brought before the court in Suit 689, all evidence in regard to the claims in the suit. (paras 48, 49, 58 & 60)

Case(s) referred to:

Ali Jais v. Linton Albert & Anor [1999] 4 CLJ 167 HC ***(refd)***

Asbir, Hira Singh & Co v. Supramaniam Pitchaimuthu & Ors [2000] 1 CLJ 7 HC ***(refd)***

Dato' Dr Zambry Abdul Kadir v. Dato' Seri Ir Hj Mohammad Nizar Jamaluddin; Attorney General of Malaysia (Intervener) [2009] 5 CLJ 265 CA ***(refd)***

Dato' HL Wrigglesworth v. Zakaria Yusoff [1995] 3 CLJ 64 HC ***(foll)***

Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***

Gurbachan Singh Bagawan Singh & Anor v. Vellasamy Pennusamy & Ors And Other Applications [2012] 2 CLJ 663 FC ***(refd)***

Jagdish Kapoor v. New Education Society AIR 1968 MP 1 ***(refd)***

Lim Soh Wah & Anor v. Wong Sin Chong & Anor And Another Appeal [2001] 2 CLJ 344 CA ***(refd)***

Maelstrom Resources Sdn Bhd & Anor v. Shearn Delamore & Co and Another Case [2007] 1 CLJ 50 HC ***(refd)***

Majid v. Muthuswamy [1968] 1 LNS 76 FC ***(refd)***

MH Land Sdn Bhd & Anor v. Ribbon Marketing Sdn Bhd & Ors [2016] 6 CLJ 99 HC ***(refd)***

Saiman Umar v. Lembaga Pertubuhan Peladang [2015] 9 CLJ 153 FC

Legislation referred to:

Contracts Act 1950, ss. 9, 10

Legal Profession Act 1976, ss. 116(1), 118(1), 121(1)(a)

For the plaintiff - Godfrey D'Cruz; M/s Godfrey D'Cruz & Co

For the defendant - Jasvinjit Singh; M/s Jasvinjit & Co

Reported by S Barathi

JUDGMENT

Nordin Hassan J:

Introduction

[1] The plaintiff, a law firm, brought this action against the defendant for unpaid legal fees and disbursements amounting to RM277,386.80.

Background Facts

[2] Based on the evidence presented in the trial, the relevant facts of this case be summarised as follows:

(i) The plaintiff is a firm of advocates and solicitors practising in the name of Sulaiman & Taye. One of the plaintiff's partners is Mr Sng Eu Kim (PW1).

(ii) The defendant is an engineering company which was incorporated in Malaysia. In the middle of 2010, Mr Yong Yu Ken (DW1), a director of the defendant had met with Mr Cyril Oliver Xavier (PW2), a lawyer, and asked his advise in finding a suitable lawyer to handle the defendant's pending suit against one main contractor and to replace the lawyer from legal firm, Shook Lin & Bok who was then handling the case for the defendant.

(iii) Thereafter, Mr Cyril (PW2) brought DW1 to a legal firm, Messrs Sng & Co and introduced DW1 to Mr Sng (PW1) who was a partner with the firm.

(iv) In the said meeting, PW1 as partner of Sng & Co was retained by the defendant to act for the defendant and to take the conduct of the defendant's pending suit from Shook Lin & Bok which was Kuala Lumpur High Court Civil Suit No. S1-22-689-2005 (suit 689).

(v) In the suit 689, the defendant sued the main contractor Perbadanan Perwira Harta Sdn Bhd (PPHSB) as first defendant and the sole shareholder of PPHSB and Perbadanan Perwira Harta Malaysia (PPHB) as the second defendant, for failing to pay the balance of the costs of piling works in the sum of RM1,082,759.18 and wasted expenditure incurred by the plaintiff in the amount of RM1,921,438, allegedly caused by the delay to the works by the main contractor.

(vi) In the same meeting, when DW1 met with PW1 at the firm Sng & Co, according to PW1 and PW2, a lump sum legal fees were agreed upon by DW1 and PW1 for the amount of RM260,000 excluding service tax of 6%. It was also agreed that the fees to be billed at the conclusion of the suit. However, this oral agreement as to the legal fees was denied by DW1 in his evidence.

(vii) Mr Sng (PW1) left the firm of Sng & Co and joined Messrs Sulaiman & Taye as a partner on or about May 2011. He brought with him the defendant's file to Sulaiman & Taye and thereafter he continued handling the case. DW1 did not object to this and had on several occasions, discussed with PW1 at Sulaiman & Taye pertaining to the said suit 689.

(viii) When PW1 took over the defendant's case from Messrs Shook Lin & Bok, the defendant's suit against PPHB, the second defendant, has been struck out. On appeal to the Court of Appeal, which was handled by PW1, the appeal was allowed and the defendant's suit against the second defendant was reinstated.

(ix) In regards to the said suit 689, on 31 May 2013, after a full trial, judgment was entered by the High Court in favour of the defendant in this case with the following orders:

(a) PPHSB to pay the defendant RM1,082,759.18 for the balance of the cost of piling works done by the defendant.

(b) PPHSB to pay the defendant RM200,000 as general damages for the delayed works caused by PPHSB and for the wasted expenditure.

(c) PPHSB and PPHB's counterclaim for liquidated asscertained damages (LAD) of RM1,101,000 was dismissed.

(d) The defendant's claim against PPHB was dismissed.

(e) PPHSB to pay costs of RM10,000 to the defendant and interest at 5% per annum from the date of judgment to the date of realisation.

(x) Thereafter, the plaintiff issued two invoices to the defendant in this case for payment which are as follows:

(a) An invoice no. 0062 dated 18 June 2013 for the sum of RM1,462.80 in regard to the transcript cost paid by Sulaiman & Taye for the notes of proceeding.

(b) An invoice no. 0063 dated 3 July 2013 for the amount of RM275,000 for the agreed fees of RM260,000 and 6% service tax.

(xi) The defendant, however, wrote a letter dated 10 July 2013 to the plaintiff objecting to the payment of the fees demanded by the plaintiff and requested the plaintiff to furnish a detailed bill as well as to have the bill taxed as cost.

(xii) As the defendant has failed to pay the amount claimed as in the invoices sent to the defendant, the plaintiff had issued a notice of demand dated 19 November 2013, but no payment was made by the defendant.

(xiii) The plaintiff then filed this suit against the defendant for the unpaid legal fees and costs of the transcript.

(xiv) The defendant, on the other hand, filed a counterclaim against the plaintiff for negligence in conducting the suit 689, which among others, causing the award for the defendant's claim for the delay and wasted expenditure to only RM200,000 instead of RM1.9 million as pleaded. The defendant's counterclaims are for general and special damages, interest and cost.

The Plaintiff's Case

[3] The plaintiff's claim is premised on an oral agreement between plaintiff and DW1 who acted for the defendant, for a lump sum legal fees of RM260,000 exclusive of the service tax of 6%.

[4] The plaintiff also contends that the amount agreed upon is reasonable based on the work done in handling the appeal at the Court of Appeal to reinstate the second defendant as party to the suit and the conduct of the full trial of suit 689.

Defendant's Case And Issues Raised

[5] On the other hand, the defendant's case is that there was no such agreement for a lump sum legal fees between PW1 and DW1.

[6] The defendant in his pleadings gave the following reasons to support the defendant's contention that there was no such agreement which are as follows:

(i) No bill was issued immediately after the alleged oral agreement.

(ii) The bill issued by the plaintiff did not mention about an agreed fees.

[7] It was also submitted by counsel for the defendant that agreement as to costs must be in writing and signed by parties as required under s. 116 of the Legal Profession Act 1976 (the LPA). The defendant also pleaded that the alleged oral agreement has violated s. 118 and s. 121(1)(a) of the LPA. As such, the agreement is said to be void and invalid.

[8] The defendant further contends that the agreement, if any, is vague and not clear nor specific to be an enforceable agreement.

[9] Next, the defendant's counsel also argued that there was no privity of contract between plaintiff and the defendant as the agreement as to the fees, if any, was between Sng & Co and the defendant and not with Sulaiman & Taye.

[10] The defendant then contends that if there was such an agreement, the amount of legal fees of RM275,000 is unfair and unreasonable.

Finding Of This Court

[11] It is an undisputed fact that no written agreement was made between parties in this case in regards to the amount of legal costs pursuant to s. 116 of the LPA.

[12] Section 116 of the Act provides as follows:

A 116(1) Subject to any written law, an advocate and solicitor **may** make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of his costs in respect of contentious business done or to be done by such advocate and solicitor, either by a gross sum, or otherwise, and either that the same rate or at a greater or lesser rate than the rate at which he would otherwise be entitled to be
B remunerated.

(2) Every such agreement shall be signed by the client and shall be subject to this Part. (emphasis added)

[13] The first issue for determination here is whether s. 116 is a mandatory
C provision requiring any costs relating to contentious matter by advocate and solicitor to be reduced in writing and signed by the client.

[14] Here, the word 'may' in s. 116(1) should be given its ordinary and natural meaning which is, it is permissive and not mandatory unless it can be shown otherwise.

D In *Jagdish Kapoor v. New Education Society* AIR [1968] MP 1 the judge said this:

It is well settled that 'may' is a discretionary and enabling word, unless the subject matter shows that the exercise of power given by provision using the word 'may' was intended to be imperative by the person whom
E the power is given.

[15] In the present case, there is nothing to indicate or basis to conclude that the word 'may' in s. 116(1) of the LPA, should be read as 'shall' or 'must'.

F **[16]** The Federal Court in *Gurbachan Singh Bagawan Singh & Anor v. Vellasamy Pennusamy & Ors And Other Applications* [2012] 2 CLJ 663 citing with approval Lord Diplock's *dictum* in *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18 agreed that the word 'may think just' means only a discretion.

G **[17]** Here, the wordings of sub-s. 116(1) are clear and unambiguous that an advocate and solicitor 'may' make an agreement in writing with the client with regard to the legal fees.

The word 'may' here gives the option for advocate and solicitor whether to have a written agreement for the legal costs with the client or otherwise.

H

[18] I am of the same view with Justice Idris Yusoff in *Dato' H.L. Wrigglesworth v. Zakaria Yusoff* [1995] 3 CLJ 64 which says this:

To my mind the wordings of s. 116 are clear. Section 116 is not a mandatory provision requiring the agreement to be reduced to writing
I – it merely says that the solicitor may make an agreement in writing and to make it binding, the client is required to sign it. If, however, for some reasons the agreement is not reduced to writing, it does not totally shut

out the solicitor from claiming his cost for he can still fall back on s. 121(1). In so doing the onus of proving that the costs are fair and reasonable, as usual, is on him unless it is a gross sum bill. He cannot avail himself of whatever benefits conferred by s. 117. The avenues as created by s. 121(1) give the solicitor the right of option, whether to present a bill containing detailed items or a gross sum bill. (emphasis added)

[19] The meaning of the word 'may' in s. 116(1) has also been discussed and followed in the case of *Asbir, Hira Singh & Co v. Supramaniam Pitchaimuthu & Ors* [2000] 1 CLJ 7, where the judge explained as follows:

In fact, even without the written agreement, the plaintiff, on the facts, would have still succeeded in enforcing the oral agreement agreed to with D1 in 1982. It is not mandatory, to reduce that oral agreement into writing, for the plaintiff to prove that it was fair and reasonable. In *Dato' HL Wrigglesworth v. Hj Zakaria bin Yusoff* [1995] 3 CLJ 64, it was held by Idris bin Yusoff J, that:

> Section 116 is not a mandatory provision requiring the agreement to be reduced to writing – it merely says that the solicitor may make an agreement in writing and to make it binding, the client is required to sign it. If, however, for some reasons the agreement is not reduced to writing, it does not totally shut out the solicitor from claiming his costs for he can still fall back on s. 121(1). (emphasis added)

[20] As to the issue of violation of s. 118 and s. 121(1)(a) of the LPA, for ease of reference, the provisions are as follows:

(1) Section 118(1)

> 118. (1) No action or suit shall be brought or instituted upon any agreement as is referred to in section 116, but every question respecting the validity or effect of any such agreement may be examined and determined, and the agreement may be enforced, varied or set aside by suit or action by summons, motion or petition by any person or the representatives of any person being a party to such agreement, or being alleged to be liable to pay, or being or claiming to be entitled to be paid the costs, fees, charges for disbursements in respect of which the agreement is made, by the Court in which the business or any part thereof was done, or a Judge of the Court, or, if the business was not done in any Court, then by the high Court or a Judge of the High Court.

(ii) Section 121(1)(a)

> 121. (1) Where the remuneration of an advocate and solicitor in respect of contentious business done by him **is not the subject of** an agreement made pursuant to section 116, the solicitor's bill of costs **may** at the option of the advocate and solicitor either contain detailed items or be for a gross sum:

A Provided that:

(a) At any time before service upon him of a writ or other originating process for the recovery of costs included in a gross sum bill and before the expiration of three months from the date of the delivery to him of the bill, the party chargeable therewith may require the advocate and solicitor to deliver to him *in lieu* of the cost a bill containing detailed items, and the gross sum bill shall thereupon be of no effect; (emphasis added)

[21] The provision of sub-s. 118(1) clearly refers to an agreement pursuant to s. 116 of the LPA which is an agreement in writing and signed by the client which is not the situation in the present case. Therefore s. 118 is not applicable.

[22] I also find there is no infringement of s. 121(1)(a) of the LPA by the plaintiff in this case. The plaintiff's case is that the plaintiff's remuneration was a fixed sums agreed by both parties.

[23] The next pertinent issue here is whether the plaintiff, on a balance of probabilities, has proved the said oral agreement of the fixed legal fees.

[24] In this regard, Mr Sng (PW1) in his evidence said that there was an oral agreement between PW1 and Mr Yong (DW1) for an agreed legal fees of RM260,000 excluding service tax of 6%. This oral agreement was made at the firm of Sng & Co and witnessed by PW2, who is also an advocate and solicitor who brought DW1 to see PW1 to discuss about DW1's pending suit against PPHSB and PPHM.

[25] PW1's evidence was corroborated by PW2 who testified that there was such an agreement of fixed legal fees of RM260,000.

[26] In the invoice no. 0063 dated 3 July 2013 which was sent to the defendant through the defendant's solicitor, at p. 4, it stated the RM260,000 as agreed fees and RM15,600 as 6% service tax.

[27] In response to the bill which was issued to the defendant, the defendant, *vide* a letter dated 10 July 2013 to the plaintiff disputed the work done by the plaintiff as stated in the said invoice and contended that the fees is unjustified and oppressive. The defendant also requested for a detailed bill and to have the bill taxed as costs.

[28] However, in the defendant's letter, a contemporaneous document, there was no denial by the defendant of the said oral agreement of fixed legal fees in the sum of RM260,000 as said by PW1 and PW2, as well as stated in invoice no. 0063 which was received by the defendant.

[29] The defendant denies the said oral agreement with PW1 on fixed legal fees of RM260,000 only in his testimony in court. However, the defendant admitted that there was discussion regarding legal fees at the firm of Sng & Co but the fees as discussed will be based on the work done by the plaintiff.

[30] Here, there is a conflict of evidence between PW1 and PW2's version with DW1's as regard to the said oral agreement of the lump sum legal fees of RM260,000.

[31] It is trite law that the court can rely on the contemporaneous document to resolve the conflict of evidence as explained by the Court of Appeal in the case of *Dato' Dr Zamry Abdul Kadir v. Dato Seri Ir Hj Mohammad Nizar Jamaluddin; Attorney General of Malaysia (Intervener)* [2009] 5 CLJ 265; [2009] 5 MLJ 464 where Raus Shariff JCA (as he then was) said this:

> [21] *It is trite law that when there is a conflict between the evidence of twowitnesses, the court would resolve the conflict by relying on the uncontroverted documentary evidence which is neutral in nature.* In *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229 at p 234, Chang Min Tat FJ has this to say:
>
> > For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with the purpose of his own to serve and if it did not account for the statements in his documents and writing. Judicial reception of evidence requires that oral evidence be critically tested against the whole of the others evidence and the circumstances of the case. Plausibility should never be mistaken for veracity ...
>
> [22] In *Graze Shipping Inc & Anor v. CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257, Lord Goff of Chiveley in delivering the judgment of the Privy Council, speaking on the same subject held that *it is of crucial importance for judges to have regard to the contemporary documents and to the overall probabilities when facing the task of assessing the evidence of witnesses* (see also *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 MLJ 433; *Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarious George Fernandez & Anor* [1989] 1 MLJ 35; *Tan Sooi Shin v. Kow Kek Hing* [1991] 3 MLJ 390; [1991] 3 CLJ 1985 and *Kumagai Gumi Co Ltd v. Zenecon-Kumagi Sdn Bhd & Ors and Another Application* [1994] 2 MLJ 789). (emphasis added)

[32] In the present case, the invoice dated 3 July 2013 and the defendant's letter dated 10 July 2013 read in its totality corroborates the oral evidence of PW1 and PW2 with regard to the said oral agreement of legal fees of RM260,000.

[33] Having considered the evidence by both parties as mentioned earlier, my findings, on the balance of probabilities, is that, there was an oral agreement between PW1 and DW1 on a fixed legal fees of RM260,000 excluding the service tax.

[34] The evidence of PW1, PW2 and the invoice no. 0063 show that the agreed fixed legal fees are clear and specific which is the sum of RM260,000. Therefore, the contention that the amount agreed was vague and unclear is untenable.

[35] The oral agreement for the said fixed legal fees is enforceable pursuant to ss. 9 and 10 of the Contracts Act 1950.

[36] Although, I have decided that s. 118 is inapplicable to an oral agreement as in the present case, I also find the work done by plaintiff from May 2010 to July 2013 which include the preparation, research work and other related matters including the conduct of the appeal at the Court of Appeal to reinstate the second defendant in the suit 689 and the full trial in that case for the plaintiff is proportionate with the agreed fixed legal fees. The fees, based on the work done by plaintiff, to me, is fair and reasonable.

[37] As to the issue of no privity of contract between plaintiff and the defendant on the alleged agreed fees, firstly, it is not the defendant's pleaded case that plaintiff is not entitled to claim the fees as the plaintiff is not the party to the agreement. As such, the issue should not be considered by this court. (*Saiman Umar v. Lembaga Pertubuhan Peladang* [2015] 9 CLJ 153; [2015] 6 MLJ 492).

[38] In any event, considering the evidence adduced in court, DW1 himself admitted that the only counsel he liaised with and gave his instruction was PW1 when PW1 was with Sng & Co. DW1 also did not object when PW1 continue to handle DW1's case when PW1 moved to Sulaiman & Taye. In fact, DW1 continued meeting with PW1 and gave instruction after PW1 has moved to the plaintiff's firm. I agree with counsel for the plaintiff that the defendant had acquiesced by his conduct which continues to engage PW1 when PW1 has already moved to Sulaiman & Taye without any objection.

[39] In *MH Land Sdn Bhd & Anor v. Ribbon Marketing Sdn Bhd & Ors* [2016] 6 CLJ 99, the judge had this to say:

> [62] A retainer does not have to be in writing and may be oral. It can also be inferred from acts subsequently done by the solicitor and acquiesced to by the client. In *Blyth v. Fladgate* [1891] 1 Ch 337 the court held that though there had not been an express retainer, the relation of solicitor and client might be inferred from the acts of the parties.

[40] Hence, the defendant's contention on privity of contract is also without merit.

[41] In regards to the invoice no. 0062, based on the evidence of PW1, the receipt of payment and the notes of proceeding produced in bundle D8, I also find that the invoice no. 0062 regarding the claim for costs of the transcript of the trial, has also been proven.

[42] Therefore, the plaintiff's claim against the defendant is allowed. The defendant is to pay the plaintiff the legal fees and disbursement including the service tax in the sum of RM275,924 and the transcript cost of RM1,462.80, with the total amount of RM277,386.80.

[43] The defendant is also ordered to pay interest of 5% per annum of the judgment sum until realisation.

Counterclaim

[44] The counterclaim by the defendant against the plaintiff is for negligence in the conduct of the said suit 689. The defendant contends that the plaintiff's negligence based on the following reasons:

(i) Failing to adduce the available evidence to prove damages arising from the delay in the project caused by the defendant in the suit resulting nominal damages being awarded.

(ii) Failing to adduce evidence and/or submit that interest on judgment sum should be awarded from the date of the writ and not from the date of judgment.

[45] In regards to this counterclaim, the plaintiff submits that it is unsustainable on the grounds of immunity and *res judicata.*

[46] The plaintiff argues that the plaintiff is not liable for the negligence as the act complained of is done in PW1 capacity as an advocate in the trial of suit 689. The case of *Majid v. Muthuswamy* [1968] 1 LNS 76; [1968] 2 MLJ 89 was relied upon to support the plaintiff's contention.

[47] As to the issue of *res judicata*, the plaintiff submits that the material evidence and issues with regard to the basis of the negligence claim have already been litigated and adjudicated in suit 689 and as such, the counterclaim is an abuse of the court process.

[48] The principle of law is well settled that an advocate is not immune from a negligence suit. This has been decided by the Court of Appeal in the case of *Lim Soh Wah & Anor v. Wong Sin Chong & Anor And Another Appeal* [2001] 2 CLJ 344; [2001] 1 MLRA 116 where the judge said this:

> Our law has, however, always differed from English law, Advocates here have never enjoyed immunity from suit for negligence.

(see also *Ali Jais v. Linton Albert & Anor* [1999] 4 CLJ 167)

[49] This principle of law, to me, is in line with the basic duty of care an advocate and solicitor owed to their client. They have the duty to exercise reasonable, skill and diligence in handling their client's case.

[50] As to the contention of *res judicata*, I find that what was adjudicated by the court in suit 689, among others was whether the Borneo Synergy, the plaintiff in that case has proved the special damages as claimed in the sum of RM1,942,438 million. However, in the present case, the defendant's counterclaim against the plaintiff is premised on the negligence of the plaintiff in conducting the case. This, to me, is two separate cause of action and the decision in this case will be based on a different consideration. Morever, the parties in this suit and suit 689 are different. As such, the principle of *res judicata* is not applicable in the present case.

[51] The pertinent issue here is, whether the defendant has proved the negligence act by the plaintiff in conducting suit 689. In this regard, the defendant has to establish on the balance of probabilities that PW1 had breached his duty of care and as the result, the defendant has suffered damage which is not too remote.

[52] Here, what constitute a breach by a solicitor has been explained in the case of *Maelstrom Resources Sdn Bhd & Anor v. Shearn Delamore & Co and Another Case* [2007] 1 CLJ 50 where the judge had this to say:

> As to what constitutes a breach generally, see the well known *dictum* of Baron Alderason in *Blyth v. Birmingham Waterworks Co.* [1856] 11 Exh 781, 784:
>
> > *The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would do so.* (emphasis added)

[53] Reverting to the present case, it is an undisputed fact that in suit 689, the judgment is in favour of Borneo Synergy, the defendant in this case, whereby the court among others, ordered the defendant in that case to pay the outstanding sum of RM1,082,759.18 and general damages of RM200,000.

[54] As to the claim for damages arising from the said delay and wasted expenditure in the sum of RM1,941,438, it is not disputed that the claim was based on the documents in bundle B5 and B7. The defendant's complaint is that the plaintiff had failed to refer these documents in defendant's witness statement or lead the relevant evidence to prove the damages.

[55] These bundles B5 and B7 is in Part B documents and were before the court. In cross-examination of DWI in the present case, he admitted that he was cross-examined in suit 689 in relation to the RM1,941,438 claim and the details of the contents of B7 was used to cross-examine DW1.

[56] DWI also admitted that the reasons for the said delay are contained in bundle B5 which is the basis for the trial judge to decide that there was a delay by the defendant in suit 689.

[57] In cross-examination, DW1 also agrees with the plaintiff's counsel that the evidence for the said RM1.9 million is in bundle B7.

[58] Therefore, I find the evidence in regards to the claim of RM1.9 million was brought before the court in suit 689 for determination.

[59] As to the issue on interest, in the plaintiff's statement of claim, the interest has been pleaded from the date of the writ.

[60] Having considered the evidence in totality, I am of the view that, the defendant has failed to prove negligence on the part of the plaintiff in handling suit 689.

[61] In the circumstances, the defendant's counterclaim is dismissed.

[62] For both the plaintiff's claim and the defendant's counterclaim, the defendant is to pay the plaintiff costs of RM15,000 and costs is subject to payment of allocatur fee.